IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 916 of 1995

with

CRIMINAL APPEAL No 722 of 1995

with

CRIMINAL APPEAL No 773 of 1995

with

CRIMINAL APPEAL No 840 of 1995
with
CRIMINAL APPEAL NO.852 OF 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMRIKSING

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 916 of 1995
   MR AD SHAH for the appellant
   Mr.A.J. Desai, APP, for Respondent No. 1
2. Criminal Appeal No. 722 of 1995
   MR AD SHAH for the appellant
   Mr. A.J. Desai, APP, for Respondent No. 1
3. Criminal Appeal No. 773 of 1995
   MR JM PANCHAL for the appellant
   Mr. A.J. Desai, APP, for Respondent No. 1
4. Criminal Appeal No. 840 of 1995
   Mr.B.C. Dave, with MR YN OZA for the appellant
   Mr. A.J. Desai, APP, for Respondent No. 1
5. Criminal Appeal No.852 of 1995
   Mr.H.N. Zhala for the appellant
   Mr. A.J. Desai, APP, for the respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: __/07/2003

C.A.V. [COMMON] JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. Five Criminal Appeals, details of which are listed hereinbelow, are filed by the original accused Nos. 1 to 6 challenging their conviction under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code ("IPC" for short) and the sentence imposed on each of them of R.I. for life and fine of Rs.1000 each in default R.I. for three months, recorded by the learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, by judgment and order dated July 20, 1995, in Sessions Case No.322 of 1994.

Sr. No.	Appeal Number	Name of the Appellants
1.	Criminal Appeal No.722 of 1995	Dharmendrasing Harbhajansing [Accused No.4]
2.	Criminal Appeal No.773 of 1995	Avdheshsing Alias Raju Devendrasing
	No.773 of 1995	Raju Diwansing

	Rajusing Alias Rajendra Raghuvirsing Bhadoriya (Accused No.6]	
3. Criminal Appeal No.840 of 1995	Jitendrasing Alias Jitu Markendesing [Accused No.2]	
4. Criminal Appeal No. 852 of 1995	Dilipkumar Nihalchand [Accused No.5]	
5. Criminal Appeal No.916 of 1995	Amriksing Alias Bittu Harbhajansing Sikh [Accused No.1]	

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2. Briefly stated, the prosecution case is as under: P.W.1, Mukeshkumar Kruparam, [hereinafter referred to as 'the complainant' for the sake of brevity], was residing in Bungalow No.39, Shiv Narayan Society, Meghaninagar, Ahmedabad. The complainant was residing in the said house along with his parents, wife, sister and younger brother, Dineshkumar Kruparam. At the time of the incident, which took lace on June 6, 1994, the complainant was studying in S.Y.B.Com. and was also serving in a firm called J.D. Electronics. The younger brother, Dineshkumar Kruparam, was serving in a private security company and was posted at the Ahmedabad Airport. The duty hours of Dineshkumar were from 11 p.m. to 8 a.m. The duty hours of the complainant were from 10 a.m. to 9 p.m. On June 6, 1994, the complainant had returned from his job and, after taking his dinner, he was relaxing on the otla of his house. Around 10.45 p.m. Dineshkumar was preparing to leave to attend his duty at the Airport. Dineshkumar after getting ready was about to leave the house, and, at that time, the complainant had gone inside the house to take a glass of water. When the complainant had gone inside the house to drink water, he had heard shouts "Bachao, Bachao " [save - save]. On hearing the shouts, the complainant had come out from the house and had seen that the accused No.1, who was armed with a sword, the accused No.2, who was armed with a knife, one Sardarji who was carrying a hockey stick, the accused No.5, who was armed with a dharia, and accused No.6, Rajendra Raghuvirsing Bhadoriya, who was armed with a knife, were inflicting blows with their respective weapons on various parts of the body of Dineshkumar. The complainant had also raised shouts and, on hearing the shouts, his mother, wife, one Murarilal Gupta, who was residing in the neighbourhood, Nileshsinh and other five

to six persons had rushed to the place of the incident. The appellants had, after beating Dineshkumar, fled away on a Hero Honda Motor-cycle and a scooter towards Meghaninagar carrying with them their respective weapons. Dineshkumar was seriously injured and was bleeding profusely. An auto-rickshaw was called and Dineshkumar was taken in the auto-rickshaw to the Civil Hospital. In the said auto-rickshaw, the complainant, his wife, and one Bhimjibhai Panchal had accompanied Dineshkumar to the hospital. The Doctor on duty at the Civil Hospital, on examination of Dineshkumar, had declared him dead. The record indicates that wardhi was sent by the duty Constable present at the Civil Hospital to Meghaninagar Police Station. On receiving the wardhi at 0.30 hrs on June 7, 1994, PSI, B.J. Sadavrat of Meghaninagar Police Station had gone to the Civil Hospital and recorded the complaint of the complainant. The said complaint was sent to Meghaninagar Police Station for registering offence against the appellants. The complaint was registered at CR. No.I-124 of 1994 of Meghaninagar Police Station against the appellants for the offences punishable under Sections 143, 147, 148, 149, 302 read with Section 34 of the IPC. The appellant, original accused No.1, Amriksing, had sustained injury on his left palm. P.W.7, Dr. Dinesh Thakkar, Casulty Medical Officer at Civil Hospital, Ahmedabad, had examined the accused No.1 at 11.45 p.m. on June 6, 1994. The medico-legal certificate with regard to the injuries sustained by the accused No.1, Amriksing, was produced by the prosecution on the record of the case at Exh.36. Investigation of the above crime was handed over to P.I. P.S. Pande. P.I. Pande had held inquest of the dead body of the deceased Dineshkumar. After holding the inquest, the dead body of the deceased Dineshkumar was sent for post-mortem. P.W.4, Dr. V.V.Patil, of B.J. Medical College, Ahmedabad, had performed post-mortem of the dead body of the deceased Dineshkumar. P.I.Pande had recorded statements of Bhimjibhai Panchal at the Civil Hospital in the early morning hours of June 7, 1994. P.I. Pande, had drawn a panchanama of scene of offence between 7 a.m. and 8 a.m. and had thereafter recorded statements of the witnesses residing in the neighbourhood of the complainant. The appellant of Criminal Appeal No.916 of 1995, Amriksing, original accused No.1, was arrested on June 7, 1994 under an arrest panchanama and a panchanama of his physical condition was also drawn. The clothes put on by the appellant Amriksing were seized under a panchanama. The clothes of the deceased Dineshkumar, after the autopsy was completed, were seized under a panchanama. On June 10, 1994, the appellant of Criminal Appeal No.840 of 1995, Jitendrasing, original

accused No.2 and the appellant No.1 of Criminal Appeal No.773 of 1995, Avadheshsing, original accused No.3, were arrested. The accused Nos. 1, 2 and 3 while in custody had shown their willingness to show the place where they had hidden the weapons used by them for inflicting the injuries on the deceased. A discovery panchanama was drawn and, in the presence of the panchas, muddamal sword, iron-pipe and knife were recovered under a joint panchanama. On July 15, 1994, the appellant of Criminal Appeal No.722 of 1995, Dharmendrasing Harbhajansing, original accused No.4, had presented himself with the muddamal hockey stick before the Investigating officer and the said accused was arrested and a panchanama of seizure of hockey stick was drawn. On July 24, 1994, appellant of Criminal Appeal No.852 of 1995, Dilipkumar Nihalchand, original accused No.5, was arrested. During custody, the accused No.5 had shown his willingness to produce muddamal dharia used by him in the commission of the crime which was discovered under a panchanama. On August 25, 1994, the appellant No.2 of Criminal Appeal No.773 of 1995, Rajendra Reghuvirsing Bhadoriya, original accused No.6, was arrested and from his possession, muddamal knife was recovered under a panchanama. All the incriminating articles and the clothes of the deceased as well as accused persons were sent to the Forensic Science Laboratory ('FSL' for short) for analysis. On receipt of the report from the FSL, and after collecting the post-mortem notes, chargesheet for the offences punishable under Sections 143, 147, 148, 149, 302 read with 34 of the IPC and under Section 135(1) of the Bombay Police Act was submitted by P.I. Pande in the Court of the learned Metropolitan Magistrate, Court No.11, Ahmedabad, on August 31, 1994, which came to be registered as Criminal Case No.1363 of 1994. As the offence under Section 302 of the IPC is exclusively triable by Court of Sessions, the learned Metropolitan Magistrate, Court No.11, Ahmedabad, by order dated October 12, 1994, had committed the case to the Court of Sessions, Ahmedabad City, where it came to be numbered as Sessions Case No.322 of 1994.

3. Charge Exh.1 was framed against the appellants for the offences punishable under Sections 143, 147, 148, 302 read with 149 of the IPC and under Section 135(1) of the Bombay Police Act. The charge was read over and explained to the appellants wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charge framed against the appellants, had examined:

(1) P.W.1, Mukeshkumar Kruparam, complainant, at Exh.16;

(2) P.W.2, Morarilal Ramlal Gupta, eye-witness, at Exh.17;
(3) P.W.3, Jagjivandas Harilal Harivar, eye-witness, at Exh.20;
(4) P.W.4, Dr. Vinayakrao Vasudevrao Patil, Medical Officer, B.J. Medical College, Ahmedabad, at Exh.22;
(5) P.W.5, Nileshsinh Ranvirsinh, eye-witness, at Exh.24;
(6) P.W.6, Sunil Vishnurao, panch, at Exh.33;
(7) P.W.7, Dr. Dinesh Natvarlal Thakkar, Medical Officer, Civil Hospital, Ahmedabad, at Exh.35;
(8) P.W.8, Hareshbhai Babulal Shah, panch, at Exh.37;
(9) P.W.9, PSI, Bhanjibhai Jivanbhai Sadavrat, at Exh.39;
(10) P.W.10, Ashokkumar Vikramsinh, panch, at Exh.44; and
(11) P.W.11, PI, Parmeshwarprasad Sarvejit Pande, at Exh.46.

The prosecution had also produced documentary evidence such as post-mortem notes at Exh.23, inquest panchanama at Exh.26, panchanama of seizure of scooter No.GVA 9372 at Exh.27, panchanama of seizure of Hero Honda Motor-cycler No.GJ-1-E-7282 at Exh.28, forwarding letter sent along with incriminating articles to the FSL at Exh.29, receipt of the FSL at Exh.30, forwarding letter sent to the FSL along with muddamal clothes of the deceased and the appellants at Exh.31, report of the FSL at Exh.32, joint discovery panchanama of discovery of knife, iron pipe and sword at Exh.34; panchanama of place of incident at Exh.38, wardhi sent from the Civil Hospital to Meghaninagar Police Station at Exh.40, First Information Report lodged by the complainant at Exh.41, discovery panchanama of dharia at the instance of the accused No.5 at Exh.45, panchanama of seizure of clothes of the appellant, Amriksing, at Exh.47, etc. to prove the case against the appellants.

4. After the evidence of the prosecution was over, the appellants were questioned generally and their statements came to be recorded under Section 313 of the Code of Criminal Procedure. The appellant of Criminal Appeal No.916 of 1995, Amriksing, original accused No.1, in his further statement, had admitted that he had sustained injury on his hand, but, he had stated that he was beaten up in the evening of June 6, 1994. That, the witnesses were deposing falsely and a concocted case was filed against them. However, no witness in defence was examined by the appellants. The defence of the appellants was of general denial.

5. The learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, on appreciation of

oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocates for the appellants, written submissions, and the written memorandum of arguments submitted by the learned counsel for the appellant, Amriksing, original accused No.1, held that:

(i) The prosecution had proved beyond doubt that on June 6, 1994, near Vidyanagar Society and Shiv Narayan Society, situated within the local limits of Meghaninagar Police Station, Ahmedabad City, at about 22.45 hrs., all the appellants-accused had formed an unlawful assembly with a common object of committing murder of deceased Dinesh Kruparam.

(ii) The prosecution had proved beyond doubt that on the aforesaid date, time and place, all the appellants-accused were armed with deadly weapons and had committed the offence of rioting to fulfil their common object of committing the murder of deceased Dinesh Kruparam.

(iii) The prosecution had proved beyond doubt that on the aforesaid date, time and place, all the appellants-accused had committed the murder of deceased Dinesh Kruparam.

(iv) The prosecution had failed to prove that the appellants by keeping with them deadly weapons in their possession, had committed breach of the Notification issued under Section 37(1) of the Bombay Police Act.

(iv) The learned Additional Sessions Judge, ultimately, held that the prosecution had proved beyond doubt that all the appellants-accused had committed offences punishable under Sections 143, 147, 148, 149 and 302 of the IPC.

On the basis of the abovereferred to conclusions, the learned Additional Sessions Judge has convicted the appellants under Section 302 read with Section 149 of the IPC and sentenced each of them to undergo R.I. for life and fine of Rs.1000 each, in default R.I. for three months, which has given rise to filing of the Five Appeals by the appellants.

6. Learned advocates M/s. A.D.Shah, J.M. Panchal, B.C.Dave, H.N. Zala, and the learned Additional Public Prosecutor, Mr. A.J. Desai, have taken us through the entire record and proceedings of the Sessions case. We have minutely gone through the entire oral as well as documentary evidence with a view to reappreciate it.

7. Learned advocate Mr. A.D. Shah appearing for accused Nos. 1 and 4, has submitted that:

(i) The witnesses, who had posed as eye-witnesses, were highly interested and their presence at the place of the incident was doubtful.

(ii) Though the statements of the auto-rickshaw driver who had carried injured Dineshkumar to the Civil Hospital, and Bhimjibhai Panchal who had accompanied the injured Dineshkumar as well as the complainant, P.W.1, Mukeshkumar Kruparam, and other persons to the Civil Hospital, were recorded immediately, but they were not examined by the prosecution at the trial and, therefore, an adverse inference is required to be drawn against the prosecution.

(iii) As per the panchanama of the place of the incident, the incident had taken place 35 feet away from the residence of the complainant where no light was there and it was a complete dark night and the eye-witnesses could not have witnessed the entire incident wherein six persons armed with deadly weapons had caused as many as 15 injuries on the deceased, Dineshkumar. Admittedly, the witnesses had also deposed that there was no street light in Shivnarayan Society and, therefore, it was not possible for them to have witnessed the incident.

(iv) The registration numbers of the two vehicles, namely, Hero Honda motor-cycle and Scooter, were not mentioned in the First Information Report, which indicated that there was no sufficient light at the place of the incident wherein the complainant and other witnesses could have seen the registration numbers of the two vehicles on which the assailants had fled along with their respective weapons from the scene of the offence.

(v) None of the witnesses examined by the prosecution had referred to overt act of any of the accused, but only an omnibus statement was made by the witnesses that all the accused persons with deadly weapons carried by them had inflicted blows on various parts of the body of the deceased, Dineshkumar.

(vi) The presence of the original accused No.2, Jitendrasing, and the original accused No.4,

Dharmendrasing, was highly doubtful at the place of the incident and no injuries were noticed in the post-mortem notes, which could have been caused by the hard and blunt substances, namely, iron pipe and hockey stick, which weapons were attributed to the original accused No.2, Jitendrasing, and the original accused No.4, Dharmendrasing. It is, therefore, submitted that the medical evidence had ruled out the participation of the original accused No.2, Jitendrasing, and the original accused No.4, Dharmendrasing, in the commission of the crime;

(vii) In wardhi at Exh.40, which was treated as First Information Report sent by the Police Constable, Udaysing, from the Civil Hospital to Meghaninagar Police Station, the name of only Amriksing was mentioned and it was mentioned that Amriksing along with other five to six persons had launched attack with sword, hockey stick, dharia, pipe and knives on the deceased, Dineshkumar. The complaint, which was lodged by the complainant, at 1.30 a.m. on June 7, 1994, was filed after deliberation wherein the names of accused No.1, Amriksing, accused No.5, Dilipkumar, and accused No.3, Avdheshsing were only mentioned, whereas the accused No.4 was only described as 'Sardarji' carrying a hockey stick and another unknown person, aged about 22 years, who was carrying a knife, were mentioned. The accused No.4, who was described as Sardarji, is the real brother of the accused No.1, Amriksing, which was very well known to the complainant, Mukeshkumar and, therefore, non-mentioning of his name in the complaint at Exh.41 also raises a serious doubt about the presence of the accused No.4 at the time of the commission of the crime.

(viii) There was no motive on the part of the appellants to commit the murder of the deceased Dineshkumar. At the most, it can be said that there was an enmity between the accused No.1, Amriksing,and the complainant, Mukeshkumar and, therefore, there was no question of attributing any motive on the part of the appellants to commit the murder of deceased Dineshkumar.

8. Learned advocate, Mr.J.M. Panchal, appearing for the original accused Nos. 3 and 6, has submitted:

(i) That, the evidence of the so-called eye-witnesses was inconsistent and there were serious infirmities in their evidence and all the eye-witnesses were friends of the complainant and, therefore, their evidence is required to be closely scrutinized.

(ii) That, one Dhama Sindhi was a friend of accused No.1, Amriksing, whereas one Dinesh Sharma was a friend of the complainant, Mukeshkumar, who had taken the side of one Bharat Tekchand Sindhi, where the deceased Dineshkumar had never figured and, therefore, there was no reason to kill or launch an attack on the deceased Dineshkumar, because, at the most, the appellants had a grudge against the complainant, Mukeshkumar, and Dinesh Sharma or Bharat Tekchand Sindhi.

(iii) That, this was a case of blind murder wherein nobody had witnessed the occurrence as it was a dark night and it was the Monday of Vaishakh Vad Baras which was equivalent to June 6, 1994, when it was a near Amavas ('new moon')

(iv) That, as per the report of the FSL, at Exh.32, on the clothes of the deceased, the blood of 'AB' group was detected and, therefore, the blood-group of the deceased was 'AB'. That, the blood group of the accused No.1, Amriksing, was, admittedly, 'O". That, finger, which was found from the place of the incident, which was said to be chopped finger of the deceased, was having blood group 'A'. That, the blood group detected on the broken hockey stick which was found from the place of the incident and which was sent for analysis to the FSL, was of 'A' group which was also not of the deceased or the accused No.1. That, the report of the FSL, at Exh.32, raises serious doubt about the occurrence of the incident as deposed by the witnesses. That, as per the report of the FSL, at Exh.32, from the place of the incident, blood of group "A" was found which was not of the deceased. That, on the chappals which were of the deceased found from the place of the incident, blood of group "A" was detected which was not of the od deceased. Thus, the report of the FSL, at Exh.32, which was relied upon by the prosecution as a corroborative piece of evidence, completely belies the version of the witnesses examined by the prosecution with regard to the incident which had taken place near the house of the complainant,

Mukeshkumar.

(v) That, the complainant and other eye-witnesses were suppressing the genesis of the incident and it was highly doubtful whether the incident had taken place as deposed by the complainant and other witnesses.

(vi) That, the joint discovery panchanama at the instance of the accused Nos, 1, 2 and 3, with regard to discovery of pipe, knife, and sword, was inadmissible, because it was a joint discovery panchanama, wherein, it was not stated which of the three accused had made what statement before the panchas and the Investigating Officer. It is further submitted that as per the decision of the Supreme Court in the case of Mohd. Abdul Hafeez vs. State of Andhra Pradesh, reported in AIR 1983 Supreme Court 367, a joint discovery panchanama of weapons without recording the words used by the accused and which of the accused had made what statement before the panchas, was illegal which had ultimately made the said panchanama inadmissible in evidence.

(vii) That, the prosecution had utterly failed to explain the injuries of accused No.1. Amriksing, and a false attempt was made to explain the injuries by deposing that the accused No.1, Amriksing, had stated to other assailants that the victim was Dineshkumar and not Mukeshkumar, and, therefore, they should not inflict more blows on the victim and, saying so, he had put his hand to ward off the victim, Dineshkumar, and, while protecting the deceased, a blow of a weapon had fallen on his hand. That, if the blow was fallen on the hand, there could not have been injury on his palm and, therefore, the witnesses had deposed falsely in order to explain the injury sustained by Amriksing.

(viii) That, the names of the accused were not mentioned in the wardhi at Exh.40 and the First Information Report lodged by the complainant. That, no descriptions of the unidentified assailants were also mentioned in the First Information Report and physical structure of the assailants and, in the absence of a test identification parade during the investigation, the identification of the accused for the first time in the Court was not admissible and permissible. The names of other accused

persons were falsely mentioned at the belated stage after recording of the evidence of other witnesses and, therefore, the involvement of the accused No.2, Jitendrasing, accused No.4, Dharmendrasing, and accused No.6, Rajendrasing, was highly doubtful.

(ix) That, the name of the accused No.6, Rajendrasing, though known to the complainant, was disclosed on June 8, 1994 and, therefore, the presence of the accused No.6, Rajendrasing, was also not proved beyond doubt. It is further submitted by the learned advocate for the appellants that the name of the accused No.6, Rajendrasing, was only disclosed after the statements of P.W.2, Morarilal Ramlal Gupta, and P.W.3, Jagjivandas Harilal Harivar, were recorded. It is further submitted by the learned advocate for the appellants that the accused No.6, Rajendrasing, was known to the complainant and both of them were serving together and, in spite of that fact, the complainant had not mentioned the name of the accused No.6 in the wardhi nor in the First Information Report lodged by him before P.W.9, PSI, Sadavrat.

(x) That the conduct and behaviour of the witnesses examined by the prosecution was doubtful and it belied their presence at the scene of offence at the odd hour of 11 p.m.

(xi) That, if the presence of the accused No.2, Jitendrasing, accused No.4, Dharmendrasing, and accused No.6, Rajendrasing, was doubtful at the place of the incident, no question of forming an unlawful assembly had arisen. Therefore, the conviction of the appellants under Section 149 of the IPC was bad in law. It is also submitted that there was no evidence of the unlawful assembly led by the prosecution and, therefore also, the charge against the appellants under Section 149 of the IPC deserves to be quashed and set aside and, consequently, the conviction and sentence, with the aid of Section 149 of the IPC, deserves to be quashed and set aside.

(xii) At the end, it is submitted that, when the prosecution was trying to suppress the genesis of the occurrence of the incident and the complainant was trying to involve the innocent persons in the case, the benefit of doubt be extended in favour of the appellants and the conviction and sentence imposed on them be quashed and set aside and the

appeals be allowed.

9. Learned advocates M/s. B.C.Dave, for Senior Advocate, Mr. Yatin N. Oza, for the accused No.2, Jitendrasing, and H.S. Zala for the accused No.5, Dilipkumar Nihalchand, have adopted the submissions advanced by the learned advocates M/s. A.D. Shah and J.M. Panchal.

10. Learned APP, Mr. A.J. Desai, has supported the judgment of the trial court by submitting that:

(i) All the appellants were known to the complainant and there was no mistaken identity and the complainant had mentioned the names of some of the appellants in the First Information Report.

(ii) That, the incident had taken place all of a sudden and the complainant at the time of lodging the First Information Report could have forgotten the names of the assailants as he was in great shock due to brutal attack and murder of his younger brother, Dineshkumar.

(iii) That, the prosecution had examined relevant witnesses to unfold its case and the examination of the rickshaw driver, Asharam Gupta, Bhimjibhai Panchal and the mother of the complainant, could have only duplicated the evidence and burdened the record of the case. It is submitted that it is the quality and not the quantity which is to be appreciated.

(iv) That, the injuries sustained by the accused No.1, Amriksing, were properly explained by the prosecution and, therefore, no adverse inference requires to be drawn against the prosecution.

(v) That, none of the eye-witnesses was interested or having any animosity against the appellants and, therefore, their evidence should not be discarded or looked at with suspicion.

(vi) That, the incident had taken place near the house of the complainant and there was an electric light outside the house of the complainant and, with the aid of that light, the complainant and other witnesses had an opportunity to witness the incident and the role played by each of the assailants and the weapons used by them for inflicting the blows on the deceased, Dineshbhai.

It is submitted that all the appellants had come armed with deadly weapons with common object to commit the murder of the deceased, Dineshbhai, and, therefore, the conviction and sentence recorded by the learned Additional Sessions Judge deserves to be confirmed and the appeals be dismissed.

11. A murderous assault was launched on the deceased, Dinesh, in which, he had sustained the following injuries:

(1) A stab wound is present on right side of abdomen in posterial axillary line onlique in direction, both angles acute. It is present on outer side of abdomen on right side in upper part cavity deep.

(2) Incised wound is present on right wrist on front side size 7 x 5 cm. The Ulna bone underneath the bone is fractured by it. It is sharply cut. Margins are also sharply cut. Blood vessels sharply cut.

(3) Incised wound is present on inner side of right forearm size 2.5 x 1 cm muscle-deep.

(4) Incised wound is present on right side of neck in lower part oblique in direction size 0.5 x 1.5 cm margins sharply cut muscle deep.

(5) Incised wound is present on right side of chin size 2.5 x 1 cm muscle deep margins sharply cut.

(6) Incised wound is present on left side of the neck in lower part oblique in direction. Size 3 x .5 cm. It is muscle-deep.

(7) Incised would is present on left side of chest at upper part in mid-clevicular point. Size 2.5 x 0.5 cm skin deep.

(8) Superficial incised wound is present on left side of chest lower part. Size 1 x 0.5 cm skin-deep.

(9) Vertical incised wound is present on left side thumb - size 5 x 5 cm. The left thumb is verticially cut for 4 cm along with underlying bone. Margins are sharply cut.

(10) There is amputation of distal phalnyx of left index finger. The margins and bones and muscles of the wound are sharply cut.

(11) Incised wound is present on the base of left index finger on Parlmar side size 2.5 cm x 2.5 cm muscle-deep.

(12) An oblique superficial wound is present on front of left leg 5 cm below knee size 5 x 1 cm skin deep.

(13) Stab wound present on left side of abdomen in

little outer and middle side. It is mix-axillary line. Size 3 x 1.5 cm cavity deep. Both angles acute.

(14) Large incised wound is present on medial side of left knee size 7 x 3.5 cm muscle deep. Vessels are sharply cut. Muscles and margins are sharply cut.

(15) Incised wound is present on outer side of left thigh sixe 3 x 0.5 cm skin to muscle-deep.

According to P.W.4, Dr.V.V. Patil, who had performed post-mortem, such injuries were ante-mortem. The internal injuries found by Dr. V.V. Patil, are as under:

(1) The internal injuries are corresponding to external injury No.1. Stab wound has entered in the abdominal cavity after cutting the abdominal wall Muscles and peritoneum sharply. The tip of the stab wound lies in the substance of lever for 5.5 cm. The tract of the wound is gradually tapering towards the tip. The direction of the wound is inwards the total depth of the stab wound is about 7.5 cm. There is about 1500 cc of blood in abdominal cavity. The tissue of lever is sharply cut. All abdominal organs are pale. The stab wound of external injury No.13 has entered in the mix-cavity after sharply cutting the abdominal wall muscles and peritoneum. It has sharply cut the wall of small intestine sharply. The direction of the wound is inwards. Stomach is empty. All the internal organs of the body were pale.

In the opinion of Dr. Patil, the cause of death was due to shock and haemorrhage as a result of injuries sustained by the deceased. In the opinion of P.W.4, Dr. V.V. Patil, injuries Nos. 1 to 13, individually as well as collectively, were possible to cause death of the person in the ordinary course of nature. The oral testimony of P.W.4, Dr. V.V. Patil, and the post-mortem notes at Exh. l23, in our opinion, had proved beyond doubt that the deceased, Dineshkumar, had died homicidal death on June 6, 1994.

12. The learned advocates for the appellants have challenged the oral testimonies of eye-witnesses, namely, P.W.1, Mukeshkumar Kruparam, complainant, at Exh.16; P.W.2, Morarilal Ramlal Gupta, eye-witness, at Exh.17; P.W.3, Jagjivandas Harilal Harivar, eye-witness, at Exh.20; and P.W.5, Nileshsinh Ranvirsinh, eye-witness, at Exh.24, on the ground that they are highly interested and their presence at the place of the incident was doubtful in view of the inconsistency and discrepancy found in

their evidence.

13. Before we proceed to consider their submissions, we would like to briefly refer to the evidence of the witnesses which has been believed by the trial court and consider whether the so-called infirmities in their evidence pointed out by the learned advocates for the appellants are of any significance.

14. P.W.1, Mukeshkumar, is the elder brother of the deceased, Dineshkumar. He deposed that, on the day of the incident, after finishing his dinner, he was sitting and relaxing on the otla in front of the house. He deposed that the deceased was getting ready to move from the house to attend his duties at the Airport. P.W.1, Mukeshkumar, had gone inside the house to have a glass of water and, when he was in the house drinking a glass of water, he had heard shouts of the deceased "Bachao, Bachao". He, at once, had come out of the house and had seen that the appellants were inflicting blows on the deceased with their respective weapons. According to P.W.1, Mukeshkumar, his mother and his wife were standing and watching the incident. The witness had also raised shouts 'save - save'. On hearing the shouts of the witness, P.W.2, Morarilal, who was residing in the neighbourhood, and P.W.5, Nileshsinh, and other five to six persons had gathered at the place of the incident. P.W.1, Mukeshkumar, deposed that, after beating the deceased, the assailants had gone towards Meghaninagar on two vehicles, namely, Honda motor-cycle and scooter. The witness deposed that, when they had returned, they had taken their respective weapons with them. He deposed that accused No.3, Avdheshsing, accused No.1, Amriksing, and accused No.2, Jitendrasing had gone on the scooter, whereas accused No.4, Dharmendrasing, accused No.5, Dilipkumar and accused No.6, Rajendra Bhadoriya, had gone on the Honda motor-cycle. According to his evidence, the deceased was taken to the Civil Hospital in a rickshaw and his wife and one Bhimjibhai Panchal had accompanied him. The deceased was declared dead at the Civil Hospital by the Doctor after examination. The wardhi was sent by the duty constable present at the hospital to Meghaninagar Police Station, which was admitted in evidence at Exh.40. According to the said wardhi, the deceased was attacked by accused No.1, Amriksing, and five to six persons. A question was put in examination-in-chief to P.W.1, Mukeshkumar, that whether any of the assailants had sustained injuries in the incident. The witness replied that, during the occurrence of the incident, accused No.1, Amriksing, had spoken the words that the victim was Dinesh and not

Mukesh. Saying so, he had put his hand warding off Dinesh and, therefore, a blow of a weapon with which blows were inflicted on Dinesh, had landed on the hand of accused No.1, Amriksing.

In cross examination, P.W.1, Mukeshkumar, stated that he was aware that accused No.1, Amriksing, had sustained an injury in the incident, but he had disclosed that fact before the Investigating Officer on the next day. He stated that he had given the names of the other accused on June 8, 1994. He admitted that he knew accused No.4 for the last two to three years and, at the time of lodging the First Information Report, he knew accused No.4 by name. He deposed that he knew that accused No.4, Dharmendrasing, had taken part in the incident yet he had not mentioned his name in the First Information Report. He stated that the panchanama of scene of the incident was drawn on the next day and he had shown the place where the actual incident had taken place. According to the witness, blood, which was found from the place of the incident, was in the southern direction at a distance of 35 feet from his home. He admitted that at the first instance he had disclosed the name of accused No.1 as assailant since he was the leader. He admitted that the names of other three assailants were disclosed by him on the next occasion and on June 8, 1994 he had disclosed the names of two more assailants. The witness also admitted that accused No.1, Amriksing, had lodged a complaint against him after he had lodged the present complaint. He stated that he subsequently came to know that, in that complaint, it was alleged that he and his friend had attacked Amriksing by a sword and, in fact, a blow of sword had landed on the hand of Amriksing. He denied that there was a total darkness at the place of the incident and, therefore, the assailants could not identify his brother, Dinesh. He admitted that, when they came to know that they were wrongly beating Dinesh, they had stopped inflicting blows on him. He admitted that, when he had lodged the First Information Report, his friends and neighbours were present at the Civil Hospital. He denied the suggestion put to him that the incident had taken place at 9 p.m. and after deliberation at his house between 9 p.m. and 11 p.m. and, thereafter, at the Civil Hospital from 11 p.m. to 1 a.m., the First Information Report was lodged by including names of all the accused persons. He categorically deposed that the blows with the hockey stick were inflicted on the body of his brother. The witness denied that the accused No.4, Dharmendrasing, was falsely involved in the case as he is the real brother of accused No.1, Amriksing. He denied the suggestion that

as he was not present at the place of the incident he had not sustained any injury. He admitted that he had not mentioned the registration numbers of the two vehicles in his First Information Report. He also admitted that he had mentioned the registration number of the two vehicles on June 8,1994. He denied that, when he had gone inside the house to drink water, the deceased had already started proceeding towards the direction of the main road. He deposed that he had seen the registration number of the two vehicles when he had reached near his brother who was lying on the ground seriously injured in a bleeding condition. He deposed that, when he had come out of the house, he had seen P.W.2, Morarilal and P.W.3, Jagjivandas near the place of the incident. He deposed that he did not know from which direction they had come. He admitted that, in the complaint, he had mentioned that he can identify one Sardarji and one unknown person who had come with 'Pintu'. He also admitted that, on June 8, 1994, he had disclosed the names of two persons, in spite of the fact that the said two persons were not shown to him. In the next breath, he admitted that the name of accused No.6, Rajendra, was supplied to him by P.W.2, Morarilal. He deposed that, in the complaint, he had not given description of Raju but had mentioned his age. He stated that, when the police had arrested Raju, he had inquired which Raju was arrested. He further stated that he had seen Raju in the lock-up of the police station and P.W.2, Morarilal, had identified the person behind the lock-up as Raju. The witness was unable to depose which of the accused had inflicted blows on which part of the body of the deceased. He deposed that, when his brother had fallen down after the incident, he had taken him in his lap. He deposed that his wife, his mother and he himself were occupying the seat in the auto-rickshaw and his brother, Dineshkumar, was carried in their laps. He showed his ignorance whether the clothes of all the three persons were stained with blood. He deposed that he had no knowledge about the ownership and registration number of the said rickshaw. He deposed that he had no idea whether he had mentioned the number of the rickshaw in his complaint. On the next breath, he admitted that, in the complaint, he had stated that Dinesh, who was injured and bleeding profusely, was lifted and brought to the Civil Hospital for treatment by him and one Bhimjibhai Panchal in auto-rickshaw No.744. He admitted that there was no street light in his Society. He admitted that, at the time of the incident, P.W.2, Morarilal, did not reside in his Society, but was residing at some other place situated at a walking distance of five minutes from his Society. He deposed that he knew Morarilal for the last three to four years, but, he had not visited the

house of Morarilal. He deposed that he knew P.W.3, Jagjivandas, for the last three to four years and he had seen his house, but did not know the name of the colony. He deposed that he was not aware that witness Rajendrasinh, Morarilal and Jagjivandas were residing in the Defence Colony. He emphathetically deposed that his brother had fallen down at the place where the assailants had inflicted the blows on him. He stated that, on the next day, he had shown the place of the incident, from where, the police had collected blood stained brickbats and earth and that place was on a kachcha road situated between tenement No.14-B and a tenement which was under construction. He deposed that he was watching the incident at a distance of four to five feet from the otla of his house. He admitted that there was no street light at the place between tenement No.14-B and the tenement which was under construction. He admitted that when his brother was admitted in the Emergency Ward, one policeman had met him. He deposed that he was not aware whether he had disclosed the weapons and the names of the assailants who had caused injuries to his brother. He deposed that, when he had lodged the complaint, three witnesses had arrived [at the hospital]. He deposed that he knew Dinesh Sharma, who had arrived after he had lodged the complaint. He denied the suggestion that, after due deliberation between him and his friends from 11.30 p.m. to 1 a.m. the names of the assailants were fixed up. He deposed that, around 10 p.m. on the day of the incident, P.W.2, Morarilal Gupta, had met him near his Society and he had told him that he would return after taking dinner. He deposed that he was not aware whether Morarilal was waiting for him at Shiv Restaurant. He denied that Morarilal had come to dine with him at his house. He deposed that he had no idea that Bhimjibhai Panchal was the first person to arrive at the place of the incident. He deposed that he had heard shouts but could not say whether those shouts were coming from the direction of Kumar Classes. On the next breath, he deposed that, when he had reached the place where his brother was attacked, Bhimjibhai Panchal had already reached there. He deposed that Jagjivandas, Morarilal, Rajendrasinh Chauhan, his mother, his wife, and another four-five persons had also arrived there. He deposed that the house of Bhimjibhai Panchal was situated just opposite to his house. He deposed that he was not aware whether he had disclosed the names of accused Nos. 2 to 6 to the auto-rickshaw driver, the Doctor and the police constable. He had also shown his ignorance whether he had disclosed the name of accused No.1, Amriksing.

15. P.W.2, Morarilal Ramlal Gupta, was residing in Pushpanagar Defence Colony and happened to be a friend of P.W.1, Mukeshkumar, the complainant, and he knew deceased Dineshkumar. He had gone to Shiv Restaurant around 10 p.m. on June 6, 1994, and met the complainant at 10 p.m. The complainant had told him that he would return after taking dinner and, therefore, he was sitting at Shiv Restaurant waiting for the complainant. At 10.45 p.m. the witness had heard shouts 'Bachao - Bachao' which were coming from the direction of the house of the complainant. Hearing the shouts, the witness had gone towards the house of the complainant where he saw that Amriksing (accused No.1) was armed with sword; Dilipkumar (accused No.5) was armed with dharia; Jitendrasing (accused No.2) was armed with pipe; Avdheshsing (accused No.3) was armed with knife; Raju Bhadoriya (accused No.6) was armed with knife and Dharmendrasing (accused No.4) was armed with hockey stick, and all of them were inflicting blows with their respective weapons on the brother of the complainant. He identified the accused persons named above during his deposition. He claimed that, when he had reached the place of the incident, he saw the complainant, his wife, mother, Raju, Nilesh, Jagjivandas and other four to five persons. He stated that, due to infliction of blows with the weapons, Dineshkumar was bleeding profusely. According to him, Dineshkumar was taken in an auto-rickshaw to the Civil Hospital. The witness had also followed the complainant and other persons to the Civil Hospital. He deposed that all the assailants had run away from the place of the incident on scooter and Honda motor-cycle. He stated that the police had recorded his statement on June 8, 1994.

In cross examination, the witness stated that the distance between Defence Colony and Shiv Narayan Society was 100 to 150 meters. He stated that he had no knowledge that the complainant used to return at 10 p.m. from his job. He denied that he was waiting near the Society for the arrival of the complainant. He admitted that, in his statement before the police, he had stated that, on June 6, 1994, he had gone to meet Mukesh and was waiting near his Society around 10 p.m. He admitted that Mukesh and he belonged to the same caste. He stated that, prior to four or five days of the incident, he had met Mukesh around 10 p.m. He claimed that, being a friend of Mukesh, he knew who were friends and enemies of Mukesh. He deposed that it did not strike to him that, before going to the Civil Hospital, he should inform the police about the occurrence of the incident. He admitted that he had followed Mukesh to the Civil Hospital and

stayed there till 1 a.m. He stated that he did not know who had lodged complaint before the police. He admitted that, while going to the house of the complainant, one has to cross Kumar Classes. He also admitted that there was no street light in the Society. He claimed that, prior to the incident, he had seen the assailants on two to four occasions. He deposed that Mukesh had not introduced him to the accused persons, but, as they were on visiting terms, and they were visiting often to the place of the complainant, he knew them. He claimed that he was at a distance of 10 to 15 paces from the place of the incident and 10 to 15 persons were standing there who had witnessed the incident. The witness deposed that the accused Nos. 3 to 6 were inflicting blows on Dinesh but he cannot say which accused had inflicted blows on which part of the body of Dinesh. He admitted that he made no attempt to apprehend the assailants when they were leaving the Society. He deposed that the persons, who had gathered near the place of the incident, had not made attempt to save the deceased. He further deposed that the assailants had gone towards Meghaninagar but nobody had chased them. The witness admitted that on June 8, 1994 he had gone to the police station and his statement was recorded on that day. He deposed that he had not seen the complainant, Mukesh, at the Police Station when he had gone to give his statement before the police. He deposed that accused No.5, Dilip Sindhi, was visiting Shiv Narayan Society frequently and, therefore, he knew him. He further admitted that accused No.5, Dilip Sindhi, had often visited Shiv Restaurant and, therefore, he knew him. He deposed that he had a talk with Dilip Sindhi on one occasion in the restaurant. He admitted that prior to two months of the incident he had talked with accused No.5, Dilip Sindhi. He denied that, when the incident had taken place, Jagjivan and Raju were sitting in Shiv Restaurant. He claimed that he alone was sitting in the said restaurant. The witness shown his ignorance that, in his statement before the police, he had stated that, when he was sitting near Shiv Restaurant around 10.45 p.m. on hearing the shouts of 'Bachao Bachao', he had gone towards Shiv Narayan Society and, at that time, Jagjivan and Rajendra Chauhan also had come from the direction of Shiv Restaurant to the place of the incident. The witness had to admit that he knew accused No.5, Dilip Sindhi.

16. P.W.3, Jagjivandas Harilal Harivar, deposed that the cycle repairing shop of his uncle was situated at Shiv Narayan Society whereas his own shop of cycle repairing was situated at other place. He deposed that, when the incident had taken place, he was sitting at the

shop of cycle repairing situated near Shiv Narayan Society. He claimed that one Rajendrasinh Chauhan had come to the shop and was sitting with him. He stated that, when they had heard the shouts coming from the direction of Shiv Narayan Society, he and Rajendrasinh had run towards the direction of the shouts and when he had reached there, he had seen that all the assailants were beating the younger brother of Mukesh. He described that Amriksing (accused No.1) was armed with sword; Jitendrasing (accused No.2) was armed with pipe; Avdheshsing Bhaiya (accused No.3) was armed with knife; Dilip (accused No.5) was armed with dharia; Dharmendrasing (accused No.4) who is the brother of Amriksing was armed with hockey stick; and Raju Bhadoriya (accused No.6) was armed with knife and all were inflicting blows with their respective weapons on Dinesh. He stated that Dinesh was shouting 'Bachao Bachao', but, nobody dared to save him. He deposed that they had also raised shouts. He stated that he had heard accused No.1, Amriksing, telling to other assailants that the victim was not Mukesh but his brother Dinesh and they should not beat him. That, saying so, the accused No.1 had placed his hand to protect the deceased and a blow of weapon of one of the assailants had landed on his hand. That, thereafter, the accused No.2 had told his brother to bring Honda motor-cycle and on that motor-cycle, Raju (A-6), Dharmendrasing (A-4), and Dilip Sindhi (A-5) had gone away whereas Avdheshsing Bhaiya (A_3) and Amriksing (A-1) and Jitu Markendesing (A-2) had gone on scooter. He deposed that Dinesh was lying on the ground in bleeding condition. That, Mukesh, his mother, wife, one Bhimjibhai, Morarilal and other persons had come near the place where Dinesh was lying. He deposed that Dinesh was removed to the Civil Hospital in an auto-rickshaw and he and Rajendra had followed them to the Hospital. He stated that, as Mukesh was staying in the Society and he used to visit his shop of cycle repairing, he knew him. He claimed that he knew all six accused and, accordingly, identified them in the open Court. He deposed that he knew them because all the six accused were on visiting terms and they were visiting frequently to the house of the complainant.

In cross examination, the witness deposed that the accused Nos.1, 2 and 4 were studying with Mukesh in Raghunath Hindi High School. He deposed that he knew this fact when the police had recorded his statement. He denied that he had not stated before the police that the accused Nos. 2 and 4 were studying with Mukesh. He further denied that he had not stated before the police that the accused Nos. 2 and 4 were frequently visiting

the house of Mukesh. He stated that his shop was situated near Shiv Restaurant and Shiv Narayan Society was situated at a distance of 100 to 200 feet from his shop. He admitted that more than one person had raised shouts, which were heard by him, and he had gone running towards the place of the incident. He claimed that he had seen that assailants were inflicting blows on Dinesh for two to three minutes. He admitted that Morarilal was standing nearby at the time of the incident. He admitted that there was no street light in the Society but he volunteered that one electric bulb was on at the house of Mukesh. He stated that the place of the incident was at a distance of 40 feet from the house of Mukesh. He deposed that, even though he had witnessed the incident, he had not volunteered to inform the police that he had witnessed the incident. He admitted that on June 7, 1994, the police personnel had come to the place of the incident and carried out the investigation. He admitted that his statement was recorded by the police on June 8, 1994. A question was put to him that there was complete darkness at the place of the incident and it was not possible to identify any person. He replied that he cannot give answer to the question. He denied that he had reached the place of the incident after many shouts were raised and after many persons had gathered there and had not witnessed the occurrence of the incident. He denied that he had become eye-witness on June 8, 1994 at the insistence of Mukesh. He deposed that he had no personal touch with Mukesh except that he was visiting his shop for inflating air in his cycle. He deposed that the shop owned by him in the name of 'Sanjeev Cycle Works', was situated near Gayatri Society. He deposed that his shop was at the distance of 2 to 3 kms from Shiv Narayan Society. He deposed that, on the day of the incident, he had closed his shop at 9.30 p.m. and, thereafter, he had gone to his house, had taken dinner and, thereafter, he had come near Shiv Narayan Society on a stroll. He denied that, on June 6, 1994, after closing the shop of his uncle situated at Shiv Narayan Society, he was sitting on the otla of the shop. He admitted that, when he was sitting on the otla of cycle shop, Rajendrasinh Chauhan had come to meet him. He had to admit that before the police he had made statement that on June 6, 1994, after closing the cycle-shop, he was sitting on otla, and, at that time, Rajendra Chauhan who was residing in the Defence Colony, had come at 10.45 p.m. and sat near him on otla of the shop. He admitted that he visited the shop of his uncle situated near Shiv Narayan Society once or twice in a month. He, further, admitted that during the last two to three years, Mukesh had come for inflating air in his cycle once or twice

when he was sitting in the shop of his uncle. He deposed that he had not visited the house of Mukesh and he did not know who were the friends of Mukesh, who were visiting his house. He claimed that, as the accused persons were studying with Mukesh, he knew them. Except that, there was no acquaintance or any reason to know them. He also deposed that Mukesh had never introduced accused persons to him. He deposed that he had not seen the accused persons moving with Mukesh. He deposed that he had not informed Mukesh that he had witnessed the entire incident. He deposed that he had seen Raju and Avdheshsing twice or thrice with Mukesh during the last two to three years. He denied that Mukesh had told him to give the names of Raju and Avdheshsing and, therefore, he had disclosed their names before the Police. He deposed that the incident had taken place between Tenement No.14-B and new tenement which was under construction. He admitted that except an electric bulb which was on at the house of Mukesh, there was no other light or street light near the place of the incident. He had to admit that before the police he had not stated that, because of the bulb which was on at the house of Mukesh, he had identified the assailants with the aid of the light coming from the bulb. He deposed that, when the dead body of Dinesh was brought at the house of Mukesh on the next day at 12 noon, he was present. He deposed that funeral procession had started around 1.30 or 2 p.m. He deposed that he was not aware whether at the time of bringing dead body or at the time of funeral procession, the Police Inspector of Meghaninagar Police Station was present at the house of Mukesh.

17. P.W.5, Nileshsinh Ranvirsinh Rajput, had also claimed to have witnessed the incident. He deposed that he was residing in Bungalow no.A/12 situated in Shiv Narayan Society and, therefore, he knew Mukesh. He deposed that on the day of the incident around 10.30 p.m. he was sitting on the terrace of his house. Due to heat, he had taken a stroll towards the Airport. That, when he was returning after having stroll, and when he had reached near Shiv Restaurant, he had heard shouts 'Bachao Bachao'. He deposed that the shouts were coming from the direction of kachcha road situated towards the house of Mukesh. He deposed that, when he reached there, he saw that Amriksing (accused No.1) carrying sword; Jitendrasing (accused No.2) carrying iron pipe; Dilip Sindhi (accused No.5) carrying dharia; Avdheshsing Bhaiya (accused No.3) carrying knife; Sardarji carrying hockey stick; and one unknown person armed with knife were beating Dinesh and many persons had gathered near the

place of the incident. After beating Dinesh, the assailants had run away with their weapons on scooter and Honda motor-cycle towards Meghaninagar. He deposed that Dinesh was removed in an auto-rickshaw by Mukesh, his mother, wife, and one Bhimjibhai Panchal. He knew all the assailants because they were friends of Mukesh and visiting his house. He further deposed that, as the assailants were sitting at the pan-shop, he also knew them. He stated that his statement was recorded by the police on June 7, 1994.

In cross examination, he deposed that the Bungalow No.12-A belonged to his maternal uncle and his parents were residing at Kalapinagar. He deposed that there was distance of 1.1/2 to 2 km between the place of incident and Kalapinagar. He deposed that shouts of 'bachao - bachao' were raised by Dinesh and, therefore, he had realised that Dinesh was in danger. A specific question was put to the witness during cross examination by the learned advocate for the original accused Nos.1,2 and 4 that even though he knew the accused persons, as they were regularly sitting near the pan-shop, the said fact was not disclosed in his police statement. The witness did not answer the said question. He denied that, to increase number of assailants, he acted as eye-witness on the next day. He deposed that he was residing with his maternal uncle since he was studying in Std.V. He deposed that his parents had never stayed in Tenement No.12-A at Shiv Nar Narayan Society. He denied that, at the time of the incident, he was staying with his parents. When his attention was drawn to the statement before the police that he was residing at the address along with the parents, he stated that he had not made such statement before the police but the said statement must have been written by the police on their own. The witness was not in a position to depose that how many persons had come near the place of the incident after hearing the shouts. He deposed that Dinesh was standing when all the assailants were beating him.

18. To prove the charges against the appellants, the prosecution had mainly relied on the oral testimonies of P.W.1, Mukeshkumar Kruparam, complainant, P.W.2, Morarilal Ramlal Gupta, P.W.3, Jagjivandas Harilal Harivar, and P.W.5, Nileshsinh Ranvirsinh. All the witnesses, who had claimed to have witnessed the incident, were the friends of the complainant and, therefore, their evidence requires close scrutiny. P.W.1, Mukeshkumar, was the elder brother of the deceased, Dineshkumar. A witness is normally considered to be independent unless he or she springs from sources

which are likely to be tainted and that usually means that unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often sure guarantee of truth.

19. The evidence of P.W.1, Mukeshkumar Kruparam, who is complainant, requires to be closely scrutinised as in the wardhi Exh.40 which was entered in station diary at 0.30 hrs on June 7, 1994, and which was treated as First Information Report, he had only mentioned the name of accused no.1, Amriksing, and five to six persons as assailants. After receipt of wardhi, PSI, B.J. Sadavrat of Meghaninagar Police Station had gone to the Civil Hospital and recorded the complaint of the complainant at 1.30 a.m. on June 7, 1994. In the complaint at Exh.41, he had mentioned the names of accused No.1, Amriksing, accused No.2, Jitu Markende, accused No.3, Avdheshsing Bhaiya, accused No.4, Sardarji, accused No.5, Dilip Sindhi, and accused No.6 as unknown person. Accused No.4, Dharmendrasing, is the brother of accused No.1, Amriksing. The complainant, Mukesh, had to admit that accused No.4, Dharmendrasing, was known to him. If accused No.4, Dharmendrasing, was known to the complainant, there was no reason not to mention his name in the wardhi at Exh.40 as well as in the complaint at Exh.41. Either the complainant might not have witnessed the incident or the incident might not have taken place as stated by the complainant or it may be that, due to darkness at the place of the incident, the assailants might not have been identified by the complainant and other witnesses. Otherwise, there was no reason, when accused No.4, Dharmendrasing, was known to the complainant, not to mention his name in the wardhi or in the complaint. No reasonable explanation was offered by the complainant why he had not mentioned the name of accused No.4 as an assailant carrying hockey stick and inflicting blows on the deceased. Therefore, we are of the considered view that the presence of accused No.4, Dharmendrasing, at the place of the incident becomes doubtful. It may also be mentioned that it is alleged by the prosecution that accused No.4, Dharmendrasing, was inflicting blows with a hockey stick on the deceased, but the medical evidence had belied the ocular testimonies of the complainant and other eye-witnesses, because, as per the opinion of P.W.4, Dr. V.V. Patil, no injuries were found on the body of the deceased, which could have been

caused by means of hockey stick.

20. It is the prosecution case that accused No.2, Jitu Markendesing, was carrying an iron pipe and was inflicting blows on the deceased. In the wardhi at Exh.40, the name of accused No.2, Jitendrasing Alias Jitu Markendesing, did not figure. The medical evidence was inconsistent to the oral testimonies of the complainant and other eye-witnesses. No injuries were noticed by P.W.4, Dr. V.V. Patil who had performed post-mortem on the body of the deceased which could have been caused by means of iron pipe. If accused No.2, Jitu Markendesing, was inflicting blows with iron pipe on the deceased, then the complainant would not have forgotten to mention the name of accused No.2, Jitu Markendesing, as an assailant in the wardhi at Exh.40. P.W.1, Mukeshkumar, had admitted that accused No.1, Amriksing, and accused No.2, Jitendrasing, had studied with him. If accused No.2, Jitendrasing, had studied with the complainant, there was no reason not to mention his name in the wardhi at Exh.40, which was treated as First Information Report. Therefore, we are of the view that the presence of accused No.2, Jitendrasing Alias Jitu Markendesing, at the place of the incident becomes doubtful.

21. The complainant, in his oral evidence, had also admitted that all the assailants were close friends and were moving together. We are of the view that, taking into consideration time of the incident; time of lodging wardhi; and time-gap between lodging of First Information Report, the names of other accused persons were fixed after due deliberation between the complainant and other eye-witnesses namely, P.W.2, Morarilal, P.W.3, Jagjivandas and one Dinesh Sharma who was very close friend of the complainant. The prosecution itself had come forward with a case of motive behind committing murder of the deceased by alleging that a dispute had taken place between one Dhama Sindhi and Bharat Tekchand Sindhi. The complainant and Dinesh Sharma had taken the side of Bharat Tekchand Sindhi and, due to their intervention, the dispute was settled. The accused No.1 did not approve the settlement and he being a friend of Dhama Sindhi, was having a grudge against the complainant and Dinesh Sharma. If the accused No.1 had grudge against the complainant and Dinesh Sharma, then there was no reason to commit the murder of deceased Dinesh, instead of committing murder of the complainant or Dinesh Sharma. When the assailants were inflicting blows with their respective weapons, on hearing the shouts of the deceased Dinesh, the complainant had come out of his house along with his wife and mother. It has come in the

evidence of the complainant that he was hardly at a distance of 10 to 15 feet from the place where the deceased was attacked by the assailants. If the assailants had realised that the person who was attacked was Dinesh and not Mukesh, then they would not have spared the complainant against whom they had motive and wanted to commit his murder. Nearly 10 to 15 persons had gathered near the place of the incident and nobody had courage to intervene or to save the life of the deceased. If the assailants had realised that their real target was not Dinesh but, by mistake, they had beaten him, they would have immediately launched an attack on the complainant and would not have spared him. In our opinion, the prosecution had concocted and got up the theory of motive behind the commission of murder of the deceased Dinesh. In our view, taking into consideration totality of the circumstances, the prosecution had tried to suppress the real genesis of the incident.

22. In the wardhi at Exh.40, except accused No.1, Amriksing, no other names of the assailants were mentioned. In the complaint at Exh.41, it was mentioned that an unknown person, who was carrying a knife, was a member of the unlawful assembly and was inflicting the blows on the deceased with his knife. No description of the unknown person was mentioned. The complainant, during his cross examination, denied that he did not know one Sardarji and the accused No.6 as they were unknown persons. He stated that he had informed the Police Officer that, "if he is shown the persons, he would identify them". He admitted that he can identify Sardarji and one unknown person who had come with Bintu (A-1). He admitted that nobody had shown Sardarji and the unknown person to him before June 8, 1994. In cross examination, he had to admit that the name of Rajendrasing (A-6) was given to him by P.W.2, Morarilal Gupta. He admitted that, at the time of lodging of the complaint, he had not given description of Raju (A-6) but he had mentioned his age. He stated that, when the police had arrested Raju, he had enquired "which Raju was arrested". He admitted that he had seen Raju in the lock-up. He deposed that, when he had visited the Police Station accompanied by Morarilal Gupta (P.W.2), he had seen Raju there, and Morarilal Gupta (P.W.2) had identified the arrested person as Raju. P.W.11, P.I. Pande of Meghaninagar Police Station, who had carried out the investigation, had visited the Civil Hospital after lodging of the complaint by P.W.1, Mukesh. He had recorded statement of Bhimjibhai Panchal after holding inquest of the dead body. P.W.11, P.I. Pande, had also recorded statements of mother and wife of the complainant

and Rajendranath Shivnathsing and other witnesses in the morning between 7 and 8 a.m. P.W.11, P.I. Pande deposed that on June 7, 1994, he had arrested accused No.1, Amriksing. P.W.2, Morarilal, even though had followed the complainant to the Civil Hospital after the incident and was present at the Civil Hospital till 1 p.m., the Investigating Officer did not record his statement even in the Civil Hospital itself or on the next day. P.I. Pande had recorded his statement only on June 8, 1994. In cross examination, P.I. Pande had to admit that on June 7, 1994, he had recorded statements of about 15 witnesses. The evidence of the complainant had disclosed that the name of the accused No.6 was disclosed as Rajendrasing after recording of the statement of P.W.2, Morarilal. The complainant had to admit in his cross examination that the name of the accused No.6 was supplied to him by P.W.2, Morarilal. No description of the accused No.6 was mentioned in the complaint and, in spite of there being no identification parade, the name of the accused No.6 was mentioned by the complainant on June 8, 1994. The accused No.6, though unknown to the complainant, was shown to him by P.W.2, Morarilal in the Police Station. From the above facts, it becomes evident that even though the accused No.6 was not known by face or name, the complainant had given his name on June 8, 1994 after the statement of P.W.2, Morarilal was recorded by the Investigating Officer and after he had shown the accused No.6 to the complainant. It is settled legal principle that, if the accused person is unknown to the witness, his identification for the first time in the Court is no identification in the eye of law and his presence at the place of the incident becomes highly doubtful. Therefore, we are of the view that the name of the accused No.6 was for the first time introduced as assailant by the complainant on June 8, 1994 at the behest of P.W.2, Morarilal, and, therefore, we are of the view that the presence of accused No.6 at the place of the incident becomes highly doubtful.

23. The theory of motive was cooked up as a double-edged weapon. No evidence was led by the prosecution to explain what was the dispute between Dhama Sindhi and Bharat Tekchand Sindhi; what was the compromise arrived at between said two persons; or why Dhama Sindhi and the accused No.1 had developed ill-will and enmity towards complainant and Dinesh Sharma. The above situation could have been clarified if the prosecution had examined Dinesh Sharma, who was very close friend of the complainant. The other purpose of creating the story of motive was to explain the injury

sustained by accused No.1, Amriksing, during the incident. All the eye-witnesses had tried to explain the injury sustained by accused No.1, Amriksing, by deposing that the accused No.1, on realising that they had launched attack on a wrong person, had put his hand on the deceased and, in that process, a blow with a weapon of the assailants had landed on his hand. The injury sustained by accused No.1, Amriksing, was proved by P.W.7, Dr. Dinesh Natwarlal Thakkar, who had examined accused No.1, Amriksing, at Shardaben Hospital around 11.40 p.m. on June 6, 1994. The injury sustained by accused No.1, Amriksing, was on the palm side of the hand. With regard to the injury sustained, the accused No.1, Amriksing, had filed a complaint against the complainant and another person which fact was admitted by the complainant himself during his cross examination. If accused No.1, Amriksing, had put his hand to ward off the deceased, then the blow given by the weapon could not have landed on his palm but it would have landed on the dorsal of the palm. The explanation with regard to injury sustained by accused No.1, Amriksing, during the course of the incident, is not at all satisfactory. In the complaint at Exh.41, lodged by P.W.1, Mukesh, the theory of motive was introduced after due deliberation between the complainant and other witnesses present at the Civil Hospital. P.W.1, Mukesh, in cross examination, had admitted that accused No.1, Amriksing, had lodged a complaint against him. That, the complainant and his friend had assaulted Amriksing on June 6, 1994 and, in that assault, Amriksing had sustained injury on his palm due to infliction of sword blow. According to the complainant, at the time of lodging of the First Information Report, he had knowledge that accused No.1 had sustained injury but he had not mentioned the said fact in his complaint. The accused No.1, in his further statement, had stated that he had sustained injury on his hand when he was assaulted in the evening of June 6, 1994. The complainant, with a view to create a defence in the complaint lodged by Amriksing, had tried to introduce a new case that accused No.1, Amriksing, had sustained injury during the incident and at the same time had tried to explain the said injury by introducing a false case that accused No.1, Amriksing, when realised that they had assaulted a wrong person, had tried to ward off the deceased and thereby had sustained injury on his palm. In our view, the theory of motive behind commission of murder of the deceased and the explanation offered by the prosecution with regard to injury sustained by accused No.1, Amriksing, do not stand to reason and fall flat on the ground.

24. It becomes evident from the deposition of the complainant and other witnesses that accused No.1, Amriksing, and the complainant had studied together and they were close friends. As per the case of the prosecution, all the accused persons were moving together and they often visited the house of the complainant and, therefore, they were known to other witnesses, namely, P.W.2, Morarilal Ramlal Gupta, P.W.3, Jagjivandas Harilal Harivar, and P.W.5, Nileshsinh Ranvirsinh. It was alleged by the prosecution that the dispute had taken place between one Dhama Sindhi who was a friend of accused No.1, Amriksing, and one Bharat Tekchand Sindhi. As per the evidence of the witnesses examined by the prosecution, the complainant and one Dinesh Sharma, a close friend of the complainant, had pleaded the case of Bharat Tekchand Sindhi, whereas accused No.1, Amriksing, was on the side of Dhama Sindhi. It is alleged that the said dispute was ultimately settled, but, Dhama Sindhi was dissatisfied with the said settlement and accused No.1, Amriksing, who was on the side of said Dhama Sindhi, was also displeased. The complainant deposed that, because of the said settlement, the accused No.1 had a grudge against him and Dinesh Sharma and, therefore, accused No.1, Amriksing, had wanted to take revenge on him and Dinesh Sharma. No evidence was led by the prosecution what was the complaint or dispute between Dhama Sindhi and Bharat Tekchand Sindhi. No documentary evidence was produced on the record to indicate how and when the dispute was amicably settled between the said parties. In our view, the prosecution has tried to suppress the real motive of committing murder of deceased Dinesh. It is the case of the prosecution that the complainant and accused No.1, Amriksing, were close friends because they had studied together and accused No.1, Amriksing, was visiting frequently the house of the complainant. If accused No.1, Amriksing, had grudge against the complainant, then there was no reason to commit murder of deceased Dinesh. When the murderous assault was launched on Dinesh, the complainant was very much present in the close proximity of the place of the incident. During the assault, the accused No.1, Amriksing, had realised that they had launched attack on the wrong person. In that case, they could have at once launched attack on the complainant against whom they had motive to commit his murder. The mother and the wife of the complainant were also standing near the place of the incident and witnessing the assault on the deceased. The natural conduct of the mother and the wife of the complainant would be to make efforts to save Dinesh. Besides the complainant, his mother and his wife, there were 10 to 15 persons and, out of them, three were, as

claimed by them, very close friends of the complainant, but none of them had made any effort to rescue Dinesh. The conduct of the prosecution witnesses and other persons, in our view, is unnatural, which led us to draw an inference that either they were not present at the place of the incident, or the incident had not taken place as suggested by the prosecution. The incident, as pointed out by the complainant, P.W.2, Morarilal Ramlal Gupta, P.W.3, Jagjivandas Harilal Harivar, and P.W.5, Nileshsinh Ranvirsinh, had taken place at a distance of 35 feet from the house of the complainant. Panchanama of the place of the incident, as pointed out by the complainant, was drawn on the next day by P.W.11, P.I. Pande. The complainant himself had shown the place of the incident, wherefrom, a pair of chapels, a chopped finger, and a broken hockey stick were found. The Investigating Officer had collected sample earth and blood stained pieces of brick-bats (debris). All the articles were sent to the FSL for analysis. During investigation, the clothes put on by the accused No.1 as well as the clothes put on by the deceased at the time of the incident and a leather-belt of the deceased and other incriminating articles were sent to the FSL. As per the report of the FSL produced at Exh.32, on the clothes of the accused No.1 and on the clothes and leather belt of the deceased, human blood was found. On muddamal sword, knife, and dharia seized during investigation, no blood could be detected. The articles from which the blood was found were sent to the Serologist and the report of the Serologist produced on the record along with the report of the FSL at Exh.32, had shown that, on the clothes and leather-belt of the deceased, blood group 'AB' was detected whereas on the T-shirt and pant of accused No.1, blood group 'O' was detected. The Investigating Officer, by forwarding letter at Exh.29, had sent the articles recovered during drawing of the panchanama of the place of the incident, namely, two pieces of brick-bats, blood-stained earth recovered from the place of the incident, control earth, one chopped finger of the deceased, one broken hockey-stick and one chappel with blood-stains and another chappel without blood-stains. The report of the Serologist produced on the record of the case indicated that on one piece of brick-bat, though human blood was found, blood group of the said human blood could not be ascertained. On another piece of brick-bat, the human blood of Group 'A' was found. On the blood-stained earth collected from the place of the incident, blood group could not be ascertained. On the chopped finger, broken piece of hockey-stick and two chapels, human blood of Group 'A' was detected. Admittedly, the report of the Serologist, which is

forming part of the report of the FSL at Exh.32, had proved that the blood group of the deceased, Dinesh, was "AB" and the blood group of the accused No.1 was 'O'. From the place of the incident, brick-bats and sample of blood-stained earth were seized. The place of incident was shown by the complainant, but, from the articles which were collected from the place of incident, blood-group of 'AB' could not be detected on the said articles, namely, two pieces of brick-bats and blood-stained earth. This raises serious doubt whether the place, as shown by the complainant, was the place of incident, as no blood group "AB" could be detected on the articles seized from that place. The ocular testimonies of the witnesses, who had claimed to have witnessed the incident, had proved that the deceased was attacked by lethal weapons, like, sword, knives, dharia and two hard and blunt substances like hockey-stick and iron pipe. It is the case of the prosecution that, due to infliction of the injuries with the said weapons, the deceased had sustained 15 incised wounds, which was proved by the evidence of P.W.4, Dr. Patil and post-mortem notes at Exh.23. Even the evidence of the complainant and other witnesses had proved that the deceased was lying at the place of incident in profuse bleeding condition. The clothes of the complainant, his wife and his mother were also stained with blood when the deceased was taken to the hospital in the auto-rickshaw. Unfortunately, the clothes of the complainant, his wife and his mother were not seized by the Investigating Officer. If the deceased was lying in profuse bleeding condition at the place of incident, blood group of the deceased would have been detected from the blood-stained earth and two pieces of blood-stained brick-bats seized from the place of the incident, but, the reports of the FSL and the Serologist had ruled out that the place of the incident was the same as shown by the complainant. Not finding out blood group of the deceased from the articles recovered at the time of drawing of the panchanama of the place of the incident raises serious doubt about the genesis of occurrence of incident as deposed by the complainant and his friends.

25. At the time of drawing of the panchanama of place of incident, the complainant had shown two chapels as that of the deceased Dinesh and the said chapels were seized and sent to the FSL for analysis. Admittedly, both the chapels were having blood-stains, According to the report of the FSL, on both the chapels, human blood was found, which was detected to be of blood group of 'A'. The complainant had also identified the chopped finger, which was found from the place of the incident, as that of the deceased, Dinesh. The said chopped finger

was also sent to the FSL and the report of the FSL had indicated that, on the chopped finger, human blood of Group 'A' was found. The broken hockey-stick was also sent to the FSL, but, on the said broken hockey-stick also, human blood of Group A" was found. From the reports of the FSL and the Serologist, it becomes evident that the blood group of the deceased was 'AB", and the blood group of the accused No.1 was 'O'. From the place of incident, no blood group of 'AB' was detected. On the articles collected from the place of the incident, no blood of Group 'AB' was detected. Even on the chopped finger, which was claimed to be of the deceased, Dinesh, surprisingly, blood group 'A' was found. Not finding blood group of 'AB' of the deceased on the above articles negatives the case of the prosecution that the incident had taken place near the place of the house of the complainant as shown by him which was at a distance of 35 feet from his house.

26. It is submitted by the learned APP that the report of the FSL is corroborative piece of evidence and, when the witnesses deposed that they had witnessed the incident, the oral testimonies of the said witnesses should be believed. In our view, the said submission advanced by the learned APP deserves to be rejected. As observed earlier, many infirmities and inconsistencies were found in the ocular testimonies of the complainant, P.W.2, Morarilal Ramlal Gupta, P.W.3, Jagjivandas Harilal Harivar, and P.W.5, Nileshsinh Ranvirsinh. Their presence at the place of incident, as discussed above, was highly doubtful. The conduct of the witnesses was unnatural. There was no reason for the accused Nos. 2 to 6 to have espoused the cause of the accused No.1 to become members of the unlawful assembly, armed with deadly weapons and launching murderous assault on the deceased, Dinesh, against whom, they had no grudge or enmity. P.W.2, Morarilal Ramlal Gupta, and P.W.3, Jagjivandas Harilal Harivar, were not residing near the place of the incident and we do not find any ring of truth in their testimonies that they had come near the place of the incident to meet the complainant. P.W.5, Nileshsinh Ranvirsinh, had tried to project that he was residing with his maternal uncle in Shiv Narayan Society, but, when he was confronted with the statement made before the Investigating Officer that he was residing at the address of his parents, he had to admit that it was correctly stated in the police statement that at the time of making statement, he was staying with his parents at the address shown in the police statement and his parents had never stayed in Tenement No.12-A of Shiv Narayan Society. This contradiction, as noticed in the testimony

of P.W.5, Nileshsinh Ranvirsinh, also raises serious doubt that he was staying in Tenement No.12-A of Shiv Narayan Society at the time of the incident and had witnessed the occurrence of the incident. P.W.2, Morarilal Ramlal Gupta, and P.W.3, Jagjivandas Harilal Harivar, can be said to be 'chance witnesses' and, as observed earlier, their presence at the place of the incident is also doubtful. All the three eye-witnesses, namely, P.W.2, Morarilal Ramlal Gupta, P.W.3, Jagjivandas Harilal Harivar, and P.W.5, Nileshsinh Ranvirsinh, had also shown the place of the incident as the same place which was pointed out by the complainant at the time of drawing of the panchanama on the next day. The prosecution had produced the report of the FSL and tried to prove that incriminating articles collected during drawing of the panchanama were having blood-stains and the Court is bound to take into consideration the evidence produced in the nature of the Report of the FSL to find out whether the blood, which was found at the place of the incident and on the articles collected from the place of the incident, was having blood group of the deceased. On the said articles and on the earth which was collected from the place of the incident, blood group of the deceased was not detected. When the case of the prosecution that the incident had taken place at the place shown by the complainant and the witnesses, becomes doubtful, the report of the FSL assumes much greater importance. The report of the FSL cannot be brushed aside to find out the truth whether the incident had taken place at the place suggested by the witnesses if the evidence of the witnesses examined by the prosecution suffers from serious infirmities and inconsistencies. By no stretch of imagination, it can be said that the report of the FSL should be discarded it being a corroborative piece of evidence. When the prosecution had placed on record the report of the FSL to make its case strengthened, it does not lie in the mouth of the prosecution to contend that the appellants should be convicted on the oral testimonies of the witnesses by brushing aside the reports of the FSL and the Serologist. In our view, the reports of the FSL and the Serologist, make the prosecution case shrouded in deep mystery. If the place of the incident, as shown by the prosecution witnesses, becomes doubtful, the factum of the witnesses having seen the occurrence of the incident also raises serious doubts in our mind.

27. It is the prosecution case that the accused No.4, Dharmendrasing Harbhajansing, was armed with hockey stick and was inflicting blows on the deceased with the said hockey stick. No other accused was armed with hockey

stick and only one hockey stick was used in the incident. It is surprising to note that, by recovery panchanama drawn on July 15, 1994, Exh.14/13, a hockey stick was recovered from the accused No.4, Dharmendrasing Harbhajansing. P.W.11, P.I. Pande had deposed that the accused No.4, Dharmendrasing, had surrendered himself with the hockey stick on July 15, 1994 and the said hockey stick was seized by drawing the panchanama. As stated earlier, according to the prosecution, in the assault launched on the deceased, only one hockey stick carried by the accused No.4 was used in inflicting blows on the deceased. At time of drawing of the panchanama of the place of the incident, at Exh.38, one broken hockey stick was seized from the place of the incident. No explanation was offered by the prosecution how the second hockey stick was found from the place of the incident. On the broken hockey stick found from the place of the incident, blood group "A" was detected as per the report of the Serologist. The blood group of the deceased was "AB". Therefore, on the broken hockey stick also, blood group of the deceased was not found. When the prosecution had come forward with the case that only one hockey stick was used in the commission of the crime, the recovery of two hockey sticks during the investigation had also raised serious inconsistency and infirmity in the case of the prosecution.

28. It was strenuously urged by the learned APP for the prosecution that the name of accused No.1, Amriksing, was shown as the main assailant in wardhi at Exh.40 which was treated as First Information Report and, therefore, the prosecution had proved beyond doubt that the accused No.1, Amriksing, had launched murderous assault on the deceased and, therefore, he should be convicted for having caused the murder of the deceased, Dinesh. In our view, the submission of the learned APP deserves to be rejected. No evidence with regard to enmity of accused No.1, Amriksing, either against Dinesh or against the complainant was led at the trial. On the contrary, the evidence of the witnesses had suggested that the complainant and the accused No.1, Amriksing, were close friends as they had studied together and they were moving in the company of each other. Even if the story of motive, as suggested by the prosecution, is believed, then, accused No.1, Amriksing, had grudge against the complainant only, and there was no reason to commit murder of the deceased, Dinesh. When the complainant himself was available at the distance of 10 to 15 feet at the time of occurrence of the incident, the assailants would be the last persons to spare him when it was learnt that they had launched the attack on Dinesh. It was

urged by the learned APP that, by the joint discovery panchanama, a sword was discovered at the instance of accused No.1, Amriksing, which has strengthened the case of the prosecution that he was the main assailant carrying the sword with him, with which, he had inflicted blows on the deceased. The joint discovery panchanama, at Exh.34, in our view, is inadmissible in evidence in view of the decision of the Supreme Court in the case of Mohd, Abdul Hafeez vs. State of Andhra Pradesh, reported in AIR 1983 Supreme Court 367. Not finding blood-stains on the muddamal article, sword, also raises serious doubt whether the said sword was discovered at the instance of the accused No.1, Amriksing. A faint attempt was also made by the learned APP that it was proved that the accused No.1, Amriksing, was present at the time of incident as he had sustained injuries on his hand, and, therefore, it should be held that he had taken part in the assault and had inflicted blows with sword on the deceased. In our view, the above submission of the learned APP also does not deserve any merit. As stated earlier, a vain attempt was made to explain the injuries sustained by accused No.1, Amriksing, but that attempt had failed. The accused No.1, Amriksing, had lodged a separate complaint against the complainant and his friend for the injury sustained by him, and had taken treatment at Shardaben Hospital. The First Information Report, which was lodged by accused No.1, Amriksing, was not produced on record. The way in which the prosecution had tried to explain the injuries sustained by accused No.1, Amriksing, is unacceptable as the accused No.1 had sustained injuries on his palm, rather than on the dorsal part of palm. In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(i) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
(ii) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
(iii) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused No.1 assumes

much greater importance where the evidence consists of interested witnesses. [See: AIR 1976 Supreme Court 2263; Lakshmi Singh and others vs. State of Bihar.]

29. Finally, we might stress even at the risk of repetition that the genesis and the origin of the present occurrence appears to be shrouded in deep mystery. The dramatic manner in which the assault is said to have started and involvement of the accused persons led by the accused No.1, Amriksing, who had no rhyme or reason to launch assault on the deceased Dinesh, against whom they had neither any concern or animus introduces an element of inherent improbability in the case put up by the prosecution before the Court. According to the prosecution, the main cause of the assault was the settlement of the dispute between Dhama Sindhi and Bharat Tekchand Sindhi in which the complainant and one Dinesh Sharma had pleaded the case of Bharat Tekchand Sindhi and the accused No.1, Amriksing, who was a friend of Dhama Sindhi, had grudge against the complainant and said Dinesh Sharma. There is no evidence to show that there was bad blood between the accused No.1 and the complainant. On the other hand, the evidence of the complainant and his witnesses did show that the accused No.1 had studied with the complainant and was a friend and on visiting terms to the house of the complainant. If the relations between the parties were so cordial prior to 10 to 15 days of the occurrence, we fail to see what led the accused No.1, Amriksing, by taking a complete somersault and launching murderous assault on the deceased, Dinesh. So far as the five appellants, namely, (i) Jitendrasing (A-2), (ii) Avdheshsing (A-3); (iii) Dharmendrasing (A-4); (iv) Dilipkumar (A-5) and (v) Rajusing (A-6), are concerned, they had no animus against the deceased. It is impossible to believe that these five persons would join hands with the accused No.1, Amriksing, in the nefarious plan to kill the deceased Dinesh without any provocation, without any earthly reason and without any pertinent occasion. On the other hand, the preponderance of probabilities seems to indicate that these five appellants had been falsely implicated by P.W.1, Mukeshkumar Kruparam, complainant, P.W.2, Morarilal Ramlal Gupta, P.W.3, Jagjivandas Harilal Harivar, and P.W.5, Nileshsinh Ranvirsinh, who were claiming to be close friends of the complainant and who must have made a joint effort to falsely involve the accused Nos. 2 to 6 with the incident of murder. The evidence of the witnesses examined by the prosecution had shown that they had tried to involve as many as six persons in the present case to make out a case of unlawful assembly. Introduction of accused Nos. 4 and 6

as Sardarji and unknown person even though they were known to the complainant, makes the case of the prosecution highly improbable. The participation of Jitendrasing (A-2) in the incident, as observed in the earlier part of the judgment, is also doubtful. It is the prosecution case that the accused No.3, Avdheshsing Alias Raju Diwansing, who was carrying a knife, and the accused No.5, Dilipkumar Nihalchand, who was carrying a dharia, were members of the unlawful assembly, and had launched murderous assault on the deceased, Dinesh. Even though accused No.3, Avdheshsing, and accused No.5, Dilipkumar, were known to the complainant, Mukesh, their names were not disclosed in the wardhi at Exh.40. By joint discovery panchanama, the knife was recovered from the accused No.3, Avdheshsing. As held earlier, discovery of the knife by joint discovery panchanama was inadmissible in evidence. Furthermore, no blood was detected on the knife stated to have been recovered from the accused No.3. The accused No.3 had no enmity against the deceased or the complainant. In our view, accused No.3, Avdheshsing, was involved in the incident because he was a friend of accused No.1. Amriksing. Therefore, we are of the considered view that the involvement of accused No.3, Avdheshsing, has not been proved by the prosecution beyond doubt. Similarly, the accused No.5, Dilipkumar, was also known to the complainant, but his name was not disclosed in the wardhi at Exh.40. The muddamal dharia stated to have been used by the accused No.5, Dilipkumar, at the time of the incident was discovered by discovery panchanama at Exh.45. The said dharia was discovered from an open place which was accessible by all. The said dharia, which was recovered and seized by discovery panchanama at Exh.45, was sent to the FSL, but no blood was detected as per the report of the FSL. The accused No.5, Dilipkumar, had no enmity against the deceased, Dinesh, and there was no reason for him to become a member of the unlawful assembly for the commission of murder of Dinesh. The involvement of the accused No.5, Dilipkumar, with the commission of the crime was also not proved by the prosecution beyond doubt. Not finding the blood group of the deceased at the place of the incident and on other incriminating articles also vitally affects the entire fabric of the prosecution case. Where all the witnesses enter into a conspiracy to implicate five innocent persons in a murder case, then the backbone of the prosecution is broken and it would be difficult for the Court to rely on such evidence to convict the accused No.1, particularly when the prosecution does not give any explanation for the injuries on the person of the accused No.1. This is a case where it is not possible to disengage the truth from

falsehood, to sift the grain from the chaff. The truth and falsehood are so inextricably mixed together that it is difficult to separate them. Indeed, if one tries to do so, it will amount to reconstructing a new case for the prosecution which cannot be done in a criminal case.

30. Thus, in view of the inherent improbabilities, the serious omissions and infirmities, the interested or inimical nature of the evidence and other circumstances pointed out by us, we are clearly of the opinion that the prosecution has miserably failed to prove the charge against the appellants beyond reasonable doubt and, therefore, benefit of reasonable doubt should be extended in favour of the appellants.

31. As a result of foregoing discussion, all these five Criminal Appeals are required to be allowed. Accordingly, we pass the following orders:

(I) Criminal Appeal No.722 of 1995 filed by the appellant, Dharmendrasing Harbhajansing, original accused No.4, is allowed. The conviction of the appellant under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code and the sentence imposed on him of R.I. for life and fine of Rs.1000, in default R.I. for three months, recorded by the learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, by judgment and order dated July 20, 1995, in Sessions Case No.322 of 1994, are quashed and set aside. The appellant, Dharmendrasing Harbhajansing, original accused No.4, is acquitted from the charge framed against him by giving benefit of reasonable doubt. The appellant is already on bail and his bail bonds shall stand cancelled.

(II) Criminal Appeal No.773 of 1995 filed by the appellant No.1, Avdheshsing Alias Raju Diwansing, original accused No.3, and the appellant No.2, Rajusing Alias Rajendra Raghuvirsing Bhadoriya, original accused No.6, is allowed. The conviction of the appellants under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code and the sentence imposed on each of them of R.I. for life and fine of Rs.1000 each, in default R.I. for three months, recorded by the learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, by judgment and order dated July 20, 1995, in Sessions Case No.322 of 1994, are quashed and set aside. The appellants are acquitted from the charge framed against them by giving benefit of reasonable doubt.

The appellant No.1, Avdheshsing Alias Raju Diwansing, original accused No.3, who is in custody, is ordered to be released forthwith if his presence not required in connection with any other case. The appellant No.2, Rajusing Alias Rajendra Raghuvirsing Bhadoriya, original accused No.6, is already on bail and his bail bonds shall stand cancelled.

(III) Criminal Appeal No.840 of 1995 filed by the appellant, Jitendrasing Alias Jitu Markendesing, original accused No.2, is allowed. The conviction of the appellant under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code and the sentence imposed on him of R.I. for life and fine of Rs.1000, in default R.I. for three months, recorded by the learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, by judgment and order dated July 20, 1995, in Sessions Case No.322 of 1994, are quashed and set aside. The appellant, Jitendrasing Alias Jitu Markendesing, original accused No.2, is acquitted from the charge framed against him by giving benefit of reasonable doubt. The appellant is already on bail and his bail bonds shall stand cancelled.

(IV) Criminal Appeal No.852 of 1995 filed by the appellant, Dilipkumar Nihalchand, original accused No.5, is allowed. The conviction of the appellant under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code and the sentence imposed on him of R.I. for life and fine of Rs.1000, in default R.I. for three months, recorded by the learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, by judgment and order dated July 20, 1995, in Sessions Case No.322 of 1994, are quashed and set aside. The appellant, Dilipkumar Nihalchand, original accused No.5 is acquitted from the charge framed against him by giving benefit of reasonable doubt. The appellant, Dilipkumar Nihalchand, original accused No.5, who is in custody, is ordered to be released forthwith if his presence not required in connection with any other case.

(V) Criminal Appeal No.916 of 1995 filed by the appellant, Amriksing Alias Bittu Harbhajansing Sikh, original accused No.1, is allowed. The conviction of the appellant under Sections 143, 147, 148, 149 and 302 of the Indian Penal Code and the sentence imposed on him of R.I. for life and fine of Rs.1000, in default R.I. for three months, recorded

by the learned Additional City Sessions Judge, Court No.17, City Civil Court, Ahmedabad, by judgment and order dated July 20, 1995, in Sessions Case No.322 of 1994, are quashed and set aside. The appellant, Amriksing Alias Bittu Harbhajansing Sikh, original accused No.1, is acquitted from the charge framed against him by giving benefit of reasonable doubt. The appellant, Amriksing Alias Bittu Harbhajansing Sikh, original accused No.1, who is in custody, is ordered to be released forthwith if his presence is not required in connection with any other case.

Muddamal be destroyed in terms of the directions given by the learned Additional City Sessions Judge in paragraph 5 of the operative order of the impugned judgment.

(M.H. Kadri, J.)

(H.H. Mehta,J.)

(swamy)